IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

BENJAMIN F. BELCHER,
Petitioner,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, a Corporation,
Respondent.

No. [redacted] 25

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

BENJAMIN F. BELCHER, Petitioner, vs. LOUISVILLE AND NASHVILLE RAILROAD COMPANY, a Corporation, Respondent.	No. 682.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The alleged accident on account of which this action is brought occurred February 15, 1939, in the State of Tennessee, at the switch yards in the City of Nashville. This cause was instituted in the City Court of East St. Louis, Illinois, on June 22, 1940, and is predicated on the Federal

Employers' Liability Act. Respondent filed a motion in the City Court of East St. Louis in said cause questioning the jurisdiction of said Court of the subject matter thereof, on the ground that Section 1 of Article VI of the Constitution of Illinois 1870, limits the jurisdiction of that Court to suits arising within the city limits of East St. Louis. This motion was overruled in the City Court.

Petitioner then moved said Court to allow a change of venue of said cause to the Circuit Court of St. Clair County (R. 23), Illinois, **because said City Court had no jurisdiction of the subject matter thereof,** which motion the City Court allowed. A transcript of the alleged record in said suit in said City Court was filed in the Circuit Court of St. Clair County, Illinois, on the 10th day of August, 1942 (R. 25), nearly three and one-half years after the date of said alleged accident. Respondent appearing specially made a motion to quash the summons issued by the City Court and to dismiss the cause for the reason that the Court was without jurisdiction of the subject matter of such suit, and because its process of summons was invalid; also, because the time within which a suit predicated on the Federal Employers' Liability Act could be instituted was barred by limitation (R. 39); that said motion was allowed by the Circuit Court and said cause dismissed (R. . .); whereupon on appeal to the Supreme Court of Illinois the judgment of the Circuit Court was affirmed (384 Ill. 281). The Supreme Court of Illinois based its decision principally upon petitioner's failure to "commence" his suit in a court of competent jurisdiction. There being no "case" pending in the City Court, a court having no jurisdiction whatever, there could be no change of venue. Thereafter plaintiff petitioned for the writ of certiorari involved in this suit in this court.

I.

Respondent contends that this Court has no jurisdiction of this cause on a writ of certiorari for the following reasons:

1. The decision of the Supreme Court of Illinois rests upon a nonfederal ground which independently and adequately supports the State Court judgment. In such case this Court will not take jurisdiction.

Kalb v. Feurstein, 308 U. S. 433, 84 L. Ed. 370, 373;
Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U. S. 157, 164;
Chicago, B. & Q. Ry. v. Illinois ex rel., etc., 200 U. S. 561, 580;
West Chicago etc. R. Co. v. Illinois ex rel., etc., 201 U. S. 506, 519;
Murdock v. Memphis, 20 Wall. 590, 634;
Klinger v. Missouri, 13 Wall. 257, 263;
Lynch v. New York ex rel., 293 U. S. 52, 54;
Honeyman v. Hanan, 300 U. S. 14, 81 L. ed. 476;
Louisville Gas & El. Co. v. Coleman, 277 U. S. 32.

The opinion of the Court in Herb v. Pitcairn, 384 Ill. 237, is in itself proof that this case was decided on nonfederal grounds.

Whether or not a state court has jurisdiction of an alleged cause of action, although begun under the Federal Employers' Liability Act, does not present a federal question.

St. Louis etc. Ry. Co. v. Taylor, 210 U. S. 281, 285;
Mondou v. N. Y., N. H. etc. R. Co., 223 U. S. 1, 58;
Chambers v. B. & O. R. Co., 207 U. S. 142, 148;
John v. Paullin, 231 U. S. 583;
Manning v. Ketcham, 58 Fed. (2d) 948.

State courts derive their jurisdiction from the courts and laws of the states. The Federal Employers' Liability Act does not attempt to enlarge or regulate the jurisdiction of

state courts, but only gives an injured person the right to file suit under that Act in a state court, where such a court, under the local law, has jurisdiction to hear cases of that character, as Congress cannot confer jurisdiction upon any court which it has not created.

> St. Louis etc. R. Co. v. Taylor, 210 U. S. 281, 285;
> Chambers v. B. & O. R. Co., 207 U. S. 142, 148;
> Mondou v. N. Y., N. H. etc. R. Co., 223 U. S. 1, 58;
> Taylor v. Southern Ry. Co., 350 Ill. 139;
> Walton v. Pryor, 276 Ill. 563, 566;
> Yazoo etc. R. Co. v. Mullins, 249 U. S. 531.

The state laws and practice relative to the jurisdiction of state courts, the mode, time and manner of invoking that jurisdiction, and the rules of practice to be applied in its exercise are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of local or general law.

> John v. Paullin, 231 U. S. 583;
> Callan v. Bramford, 139 U. S. 197.

The proper construction, interpretation and effect of a state statute, being a question of local law, and not a federal law, the decision of a state court thereon is not subject to review by the Federal Supreme Court on writ of error to the state court.

> Knights of Pythias v. Meyer, 265 U. S. 30;
> Hotel etc. v. Wisconsin E. R. Bd., 315 U. S. 437;
> Brinkerhoff-Faris Tr. & Sav. Co. v. Hill, 281 U. S. 673;
> Senn v. Tile Layers Union, 301 U. S. 468;
> Moore v. I. C. R. Co., 312 U. S. 630;
> 14 Am. Juris, Sec. 99, and cases cited;
> St. Louis etc. Land Co. v. Kansas City, 241 U. S. 419;
> Marine Bank v. Kalt-Zimmers Co., 293 U. S. 357.

Whether a state court has jurisdiction of a case or not is a question exclusively for the state court, and its decision

is not reviewable in the United States Supreme Court on certiorari.

Smith v. Adsit et al., 16 Wall. 185.

The City Court of East St. Louis was without jurisdiction of the subject matter of said cause for the reason it arose outside of and beyond the city limits of said city. So that petitioner's alleged cause of action was not "commenced" in said court nor in any court within the time required by Section 6 of the Federal Employers' Liability Act. So that no change of venue was possible and recovery was barred.

Sec. 6, Fed. Emp. Liability Act (Sec. 56, Title 45, U. S. C. A. 1941);
Central Vermont Ry. v. White, 238 U. S. 507;
Phillips v. Grand Trunk Ry. Co., 236 U. S. 662, 666;
Atlantic Coast Line v. Burnette, 239 U. S. 199.

No suit was commenced:

Fidelity Trust Co. v. Gill Car Co., 25 Fed. 737;
Crowley v. Southern Ry. Co., 139 Fed. 851;
Denny v. So. Pac., 263 Ill. App. 106;
Trapp v. B. & O. R. Co., 283 Fed. 655;
Sweet v. Chattanooga El. L. Co. (Tenn.), 36 S. W. 1090;
Willing v. Provident Tr. Co., 21 Fed. Sup. 237;
Walton v. Pryor, 276 Ill. 563;
Herb v. Pitcairn, 384 Ill. 237.

It is contended, therefore, there is no federal question involved in this suit, but that it was decided on a non-federal ground. At most there is only the question whether suing in a state court having no jurisdiction tolls the federal statute. That it does not is not an open question.

Borrow Steamship Co. v. Kane, 170 U. S. 100, 110;
Goldey v. Morning News, 156 U. S. 518;

Wunderlich v. National Surety Corp., 24 Fed. Sup. 645;
Swift v. Penn. etc. R. Co., 58 Fed. 858, 861;
Stephinson v. Grand Trunk etc. R. Co., 110 Fed. (2d) 405;
Walton v. Pryor, 276 Ill. 566;
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Atlantic Coast Line R. Co. v. Burnette, 239 U. S. 199;
Bell v. Wabash Ry. Co., 58 Fed. (2d) 569;
34 Am. Jurisprudence, Sec. 284;
Vaught v. V. & S. R. Co., 132 Tenn. 679, 179 S. W. 314.

II.

2. There is not drawn in question in this suit the validity of a statute of the United States nor the validity of a statute of the State of Illinois on the ground of its being repugnant to the Constitution or laws of the United States; nor is any right, title or immunity set out in any alleged errors in the Supreme Court of Illinois except inferentially in the construction of the Illinois Venue Act by the Court. It does not affirmatively appear that a federal question was ever presented or decided, or was necessary to the decision.

Brown v. Atwell, 92 U. S. 327;
Citizens Bank v. Board of Liquidation, 98 U. S. 140;
Chouteau v. Gibson, 111 U. S. 200;
New Orleans Waterworks Co. v. Louisiana, 125 U. S. 18;
Lynch v. New York, 293 U. S. 52, 55.

The United States Supreme Court has often decided that it is not enough to give such Court jurisdiction over the judgment of a state court for the record to show that a federal question was argued or presented to that court for decision. It must appear that its decision was necessary

to the determination of the cause and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

Commercial Bank of Cincinnati v. Buckingham's Executors, 5 How. 344;
Lawler et al. v. Walker et al., 14 How. 154;
Railroad Company v. Rock, 4 Wall. 180;
Parmelee v. Lawrence, 11 Wall. 38;
Brown v. Atwell, 92 U. S. 327.

III.

3. There is no substantial federal question involved in this case.

The reference in the Court's decision in the Herb case, above referred to, to the Federal Employers' Liability Act, Section 6 (Title 45, Sec. 56, U. S. C. A.), if that reference be deemed of any importance to the decision of the Illinois Supreme Court, is in line with the decisions of this Court on the same question and presents nothing new.

The Harrisburg, 119 U. S. 199, 214;
Atlantic Coast Line R. Co. v. Burnette, 239 U. S. 199;
Central of Vermont Ry. Co. v. White, 238 U. S. 507.

To be reviewed on certiorari there must be a real substantial question upon which the case may be made to turn, a question essential to the jurisdiction of this Court, and if it be that the question is absolutely devoid of merit so much so as to be frivolous, or has been explicitly foreclosed by decision or decisions of this Court as to leave no room for real controversy, the petition cannot be heard here.

Equitable Life Assurance Society v. Brown, 187 U. S. 308;
New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 345, and the voluminous authorities there cited;

Contributors to Pennsylvania Hospital v. City of Philadelphia, 245 U. S. 20;
Chanute City v. Trader, 132 U. S. 210;
Richardson v. Louisville & Nashville R. Co., 169 U. S. 128;
Blythe v. Hinckley, 180 U. S. 333, 338.

This suit was decided by the Supreme Court of Illinois wholly on the question of lack of jurisdiction of the subject matter of the City Court of East St. Louis. The City Court of East St. Louis is a court of limited jurisdiction and has no jurisdiction for any purpose whatever of a suit arising without and beyond the territorial limits of the city (City of Chicago v. Cook County, 370 Ill. 306). Section 1 of Article VI of the Constitution of Illinois of 1870 is a limitation upon city courts, and it is held uniformly by the Supreme Court of Illinois that the Legislature cannot enact any law, because in violation of Article VI, Section 6, of the State Constitution, which would give city courts jurisdiction of causes not arising within the territorial limits of the city in which the court is established.

Ladies of Maccabees v. Harrington, 227 Ill. 511, 517;
Werner v. Illinois Central Railroad Company, 379 Ill. 359;
Mitchell v. Louisville & Nashville R. R. Co., 379 Ill. 522;
Smith v. Louisville & Nashville R. Co., 381 Ill. 55;
Herb v. Pitcairn, 384 Ill. 237.

QUESTION PRESENTED.

The only question here presented is whether the City Court of the City of East St. Louis had jurisdiction under the Constitution and laws of Illinois to hear and determine said cause and had jurisdiction to enter an order changing the venue of said cause to the Circuit Court of St. Clair County.

SUMMARY OF ARGUMENT FOR DENYING THE WRIT OF CERTIORARI.

1. This case was decided by the Supreme Court of Illinois on a purely nonfederal ground which independently and adequately supports the state court's judgment.

2. A state court's construction of a state statute or of the State Constitution is followed by the United States Supreme Court.

3. There was no suit pending in the City Court of East St. Louis, Illinois, in this cause, and no change of venue could be had, and the venue statute was inapplicable and not involved.

4. The fact that under the State Constitution city courts are limited in their jurisdiction to suits arising within the territorial limits of a city is not objectionable as against any Federal Constitution or federal law, and particularly as against the Fourteenth Amendment, which is not violated if all persons within the territorial limits of the respective jurisdictions of the city courts have an equal right in like cases and under like circumstances to resort to them for redress.

5. There is no contention on the part of petitioner that Section 1 of Article VI of the Constitution of Illinois is invalid; neither is it charged that the Illinois Venue Act (Sec. 36, Chap. 146, Illinois R. S. 1943) is unconstitutional or invalid. It is contended by respondent that no alleged errors in the Supreme Court of Illinois are sufficient to raise a federal question.

Where no question is raised as to the validity of a statute of the United States, but merely as to its application to the case, no federal question arises.

Cameron v. U. S., 146 U. S. 533, 36 L. Ed. 1077.

6. The basis for a writ of certiorari must be a substantial federal question. The petition herein raises no substantial federal question. If it is considered that a federal question is raised it would involve the construction of Section 6 of the Federal Employers' Liability Act, which the state court decided in line with the decisions of the United States Supreme Court, and presents nothing new, and is devoid of merit.

ARGUMENT.

Petitioner, in his application for a change of venue from the City Court of East St. Louis to the Circuit Court of St. Clair County, admits lack of jurisdiction in the City Court to try this cause. The opinion of the Supreme Court, in the case of Belcher v. Louisville & Nashville Railroad Company, refers to the Herb case, above noted, for the reasons for its decision, the two cases having been at the same term in the Illinois Supreme Court, and involving the same questions.

In the Herb case (384 Ill. 237) the Court expressly stated in its opinion that it had been determined that city courts in Illinois were without jurisdiction to hear and determine the subject matter of any action the cause of which arose outside of the territorial limits of the City Court in which the action was pending, and

> "the material point for consideration is whether the plaintiff has commenced an action within two years of the date of his injury in a court having jurisdiction to hear and determine the same. * * * The question involved relates to the effect of the proceedings had in a court wholly incompetent to render a valid judgment because, if the judgment to be rendered would be void, it necessarily follows the preliminary proceedings of the court necessary to rendition of judgment must likewise be void. If the court has no jurisdiction of the subject matter for judgment there can be no jurisdiction giving effect to process or pleadings. If judgment had been entered in the city court it would have been absolutely void."

And the Court, in this opinion, said further:

> "If the ultimate object to be obtained in a suit at law, namely, a judgment, is utterly void, it is difficult to understand how any of the preliminaries to such a judgment, such as summons, pleadings, interlocutory

> orders and the like, have any effect when the result, had such proceeding been completed in the first court, would have been a nullity."

The Court in this case further held:

> "It is clear a suit was not commenced by filing the present suit in the City Court of Granite City by issuing summons or filing a complaint. Lacking requisite jurisdiction because of the provisions of the Constitution limiting it to cases arising within the limits of the city such Court was wholly incompetent to render any judgment or to authorize any proceedings which would result in a judgment. When the case was transferred to the Circuit Court of Madison County some five years after the date of the accident by the filing of the transcript of orders entered in the City Court and the pleadings and other documents (likewise applicable to this, the Belcher case), **there was no commencement** of a suit, but only the receipt of papers from a court in which it was impossible to commence one because of its lack of jurisdiction. To hold the suit was started in the Circuit Court at the time when it was attempted to be commenced in the City Court is not only to decide something which is obviously not the fact, but also to give effect to the proceedings in another court which up to that time must be considered a nullity. To so hold would, in effect, revive a cause of action already barred by limitations and deprive the defendant of a vested right. Cooley's Constitutional Limitations, page 448."

The Court in its opinion then added:

> "This determination makes it unnecessary to pass upon either the constitutional question involved or the validity of the change of venue statute."

In this connection, it is respondent's contention that the case in the Supreme Court of Illinois was decided on the question of jurisdiction wholly, and that neither the Constitution nor any statute of the United States was involved

and that the decision rests wholly upon a nonfederal ground which independently and adequately supports the judgment.

Where the decision of the state court is deemed to rest upon a nonfederal ground which independently and adequately supports the state court judgment, this Court will not exercise jurisdiction to review notwithstanding the raising of federal questions upon the state court record or the decision of those questions by the state court.

Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U. S. 157, at 164;
Chicago, B. & Q. Ry. v. Illinois ex rel. etc., 200 U. S. 561, 580;
West Chicago etc. R. Co. v. Illinois ex rel. etc., 201 U. S. 506, 519;
Murdock v. Memphis, 20 Wall. 590, 634;
Klinger v. Missouri, 13 Wall. 257, at 263;
Lynch v. New York ex rel., 293 U. S. 52, at 54

It is apparent from the reading of the decision in the Herb case above cited that the Supreme Court of Illinois held that no suit had been instituted in the City Court of Granite City (also applicable to the City Court of East St. Louis in the instant case); and that there was nothing to transfer to the Circuit Court; the Court also said that a suit involving the Federal Employers' Liability Act must, within two years, be instituted in a court of competent jurisdiction. It is apparent that this was not done and the Court held that the filing of the papers in the Circuit Court after the limitation period provided in Section 6 of the Federal Act would be ineffective because barred. This statement of the Supreme Court of Illinois was not necessary to its decision, but even so, what the Court there said is in line with the decisions of this Court that the condition of liability depends upon the institution of such a suit in a court of competent jurisdiction within the two-year period, even if such transfer of papers would

be considered the institution of a suit. No state statute or decision can serve to extend the period for filing the suit provided in the Act of Congress.

Removal of action from a state court, which has no jurisdiction, to a federal court, confers no jurisdiction on the federal court.

Venner v. Michigan Cent. R. Co., 271 U. S. 127.

"If the state court lacks jurisdiction of the subject matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction."

Lambert Co. v. Balt. & Ohio R. R. Co., 258 U. S. 377, 382;

Bull v. Chicago, M. & St. P. Ry. Co., 6 Fed. (2d) 329, 332.

A federal court has no jurisdiction of a case removed from a state court, unless the state court from which it was removed had jurisdiction of the subject matter of the suit.

Compton v. Carter Oil Co., 283 Fed. Rep. 22.

A federal court cannot acquire jurisdiction by removal on the ground of diversity of citizenship of a cause of which the state court was without jurisdiction.

Richter v. E. St. Louis & Sub. Ry. Co., 26 Fed. Rep. (2d) 220.

"An action commenced in a court having no jurisdiction to entertain it is no action, in the sense of the statute. The matter stands the same as if no suit had been brought or attempted to be brought, and the limitation runs from the date of the injury. If the action is brought in a court without jurisdiction, the whole proceeding is void and of no effect; and if it should proceed to judgment, the judgment likewise is void and without validity."

Sweet v. Chattanooga Elec. Light Co., 36 S. W. 1090.

> The courts of the United States upon removed cases have no wider jurisdiction than have the courts of the state from which they were removed. The removal simply transfers the hearing from the state to the national tribunal, but does not enlarge the right of the court to hear the cause.
>
> Swift v. Philadelphia etc. R. Co., 58 Fed. 858, 861.

The same principle is equally applicable to state courts.

> State courts derive their jurisdiction from the constitution and laws of the state and do not derive any power from the laws of the United States and Congress cannot confer jurisdiction upon a state court or any other court which it has not ordained and established.
>
> Walton v. Pryor, 276 Ill. 566;
> St. Louis & Iron Mountain R. Co. v. Taylor, 210 U. S. 281.

In order to give this court jurisdiction it must affirmatively appear not only that a federal question was presented for decision to the Illinois Supreme Court, but that its decision was necessary to the determination of the cause or that the judgment could not have been rendered without deciding a federal question.

> Brown v. Atwell, 92 U. S. 327;
> Citizens Bank v. Board of Liquidation, 98 U. S. 140;
> Chouteau v. Gibson, 111 U. S. 200;
> New Orleans Waterworks Co. v. Louisiana, 125 U. S. 18.

The transcript of the record in this cause does not show what errors were assigned to the Supreme Court of Illinois on the appeal, and is entirely blank as to the contention made on the appeal of this suit to the Supreme Court of Illinois. The only error complained of is shown by the petition for a rehearing in such Supreme Court, and this

petition contends wholly for a construction of the Venue Act of the state to the effect that the City Court of East St. Louis had authority to enter an order changing the venue. This is not a federal question, but contends for and relates wholly to an interpretation by the Supreme Court of a state law. The Court held that no suit was commenced in the City Court of East St. Louis in this cause, and therefore no change of venue could be had because the City Court was wholly without jurisdiction to entertain the cause. The Supreme Court of Illinois has held uniformly for a period of more than eighty-five years, beginning with the case of The People v. Evans, 18 Ill. 361, which was decided in 1857, that city courts created under Section 1 of Article VI of the Constitution of Illinois (and under the corresponding section of the Constitution of 1848) have no jurisdiction whatever of the subject matter of a suit originating beyond the corporate limits of the city. We deem it unnecessary to cite all of the cases but they include:

the Werner case, 379 Ill. 559;
the Mitchell case, 379 Ill. 522;
the Smith case, 381 Ill. 55;
the Belcher case, 384 Ill. 281, and the case of Herb v. Pitcairn, 384 Ill. 237.

So that the decision in the Belcher case by the Supreme Court is in line with the uniform holding as to Section 1 of Article VI of the Illinois Constitution.

In the construction of the Constitution and laws of a state, the United States courts follow the decisions of the highest court of the state.

Klinger v. Missouri, 13 Wall. 257, 263;
Enterprise Irrigation Dist. v. Farmers Mutual Canal Co., 243 U. S. 157, 164;
14 Am. Jur., Sec. 99, pp. 313-317, and cases there cited;
14 Am. Jur., Sec. 109, pp. 325-330;

Marine Bank v. Kalt-Zimmers Co., 293 U. S. 357, 366;
Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32;
Forsyth v. Hammond, 166 U. S. 506, and authorities cited on page 519.

Petitioner concedes that the City Court was without jurisdiction of the Belcher case, yet contends that the Court had power and authority to consider an application for a change of venue—a **judicial act** necessarily—for, if not a judicial act, the court clerk or court bailiff or any individual could enter the order. We respectfully state that this position is absurd and is unsupported by authority.

Herb v. Pitcairn, 384 Ill. 237;
Fidelity Trust Co. v. Gill Car Co., 25 Fed. 737;
Crowley v. Southern Ry. Co., 139 Fed. 854;
Swift v. Phila. etc. R. Co., 58 Fed. 858, 861.

The validity of a federal statute or treaty is not denied by the mere denial of rights claimed under the statutes or treaty, for such denial may result from mere construction of the statute and its application to the facts of the cause.

Fairy v. King County, 141 U. S. 668, 673;
South Carolina v. Seymour, 153 U. S. 353, 360;
Telluride Power etc. Co. v. Rio Grande etc. Ry. Co., 175 U. S. 639, 647.

With the question whether the state statute is invalid under the State Constitution, the Supreme Court has nothing to do.

Haire v. Rice, 204 U. S. 291, 301;
Smith v. Jennings, 206 U. S. 276;
Southwestern Oil Co. v. Texas, 217 U. S. 114;
Brown-Forman Co. v. Kentucky, 217 U. S. 563, 569.

The question how the State statute shall be construed is solely for the State Court and the Supreme Court must accept the decision of the highest court of the State fixing the meaning of the State legislation as though such meaning had been specifically expressed therein. If the cause involves nothing more than the proper construction of a State statute the Supreme Court has no jurisdiction whatever, either on appeal or on certiorari.

Supreme Lodge Knights of Pythias v. Meyer, 265 U. S. 30, 32, 44 S. Ct. 432;
Quong Ham Wah Co. v. Industrial Accident Commission etc., 255 U. S. 445, 448, 41 S. Ct. 373;
Yazoo & M. etc. R. Co. v. Adams, 180 U. S. 41;
Ross v. Oregon, 227 U. S. 150, 161, 33 S. Ct. 220.

The rule is that if though a federal question was involved in controversy, and was presented to the State Court, that court's decision may be regarded as based upon an independent adequate nonfederal ground broad enough to sustain its judgment, this defeats the Supreme Court's jurisdiction to review.

Lynch v. State of New York ex rel. etc., 293 U. S. 52, 54, 55 S. Ct. 16.

It rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction and the rules of practice to be applied in its exercise, and the state law and practice in this regard are no less applicable when federal rights are in controversy than when the case turns entirely upon the questions of local or general law.

John v. Paullin, 231 U. S. 583, 585.

The equal protection clause of the Fourteenth Amendment is not violated by diversity in the jurisdiction of the several courts of a state as to subject matter or finality of decision, if all persons within the territorial limits of the

respective jurisdiction of the state courts have an equal right in like cases under like circumstances to resort to them for redress. A state may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. This was done in Illinois having reference particularly to city courts.

State of Ohio v. Akron etc. Park District, 281 U. S. 74;
Missouri v. Lewis, 101 U. S. 22, 30;
Pittsburgh etc. Ry. Co. v. Backus, 154 U. S. 421, 427;
Mallett v. North Carolina, 181 U. S. 589, 597.

The United States Supreme Court on writ of error must accept as final the ruling of the State Court of last resort on all matters of state law.

Fox River Paper Co. v. R. R. Com., 274 U. S. 651;
Ganer v. N. Y., 206 U. S. 536;
Kaukauna Power Co. v. Green Bay etc., 142 U. S. 254, 272;
Brinkerhoff Faris Tr. & Inv. Co. v. Hill, 281 U. S. 680.

Petitioner has cited, in support of his contention that the City Court of East St. Louis had a limited jurisdiction for the purpose of changing the venue of this suit, the case of Central Illinois Public Service Co. v. The Industrial Commission, 293 Ill. 62. This case has been cited in this litigation from the very beginning, and was cited in the Supreme Court of Illinois at the hearing of this suit on appeal. This Public Service Company case was instituted in a circuit court in a county in which the defendant was not a resident, but was a resident of an adjoining county. Service could not be had upon him in the county where the suit was brought. Under the provisions of the Venue Act of the state, a change of venue was allowed, but this change of venue was allowed by one circuit court to an-

other circuit court, both constitutional courts, and furnishes no precedent or support for the contention of petitioner. The Supreme Court of Illinois distinguished that case from this by saying:

> "The distinction to be drawn is that if a case is improperly filed in a court having jurisdiction of the cause generally, but without its territorial jurisdiction, it may be transferred to the proper circuit court. But if the cause is filed in a court which could never lawfully acquire jurisdiction, the transfer to the court which would have had jurisdiction gives no validity to the proceedings in the first court. We think the interpretation of the venue statute in the Gill case conclusively is against appellant."
>
> Herb v. Pitcairn, 384 Ill. 237.

There is also the additional reason why the Venue Act cannot apply in the instant case, in that to apply a state statute to a city court for the purpose of giving it jurisdiction that it does not now have would violate Section 1 of Article VI of the Constitution of Illinois. The Supreme Court of Illinois has held repeatedly that the Legislature has no power to increase the jurisdiction of the City Court because of the limitation fixed in the State Constitution.

> Ladies of Maccabees v. Harrington, 227 Ill. 511, 517; People v. Evans, 18 Ill. 361.

So that our contention is that it is apparent that the City Court of East St. Louis had no jurisdiction of this cause for any purpose; that a suit was not "commenced" in the City Court, was not pending there, and, therefore, there was nothing to transfer to the Circuit Court.

A city court in Illinois is wholly different from a circuit court, which is a constitutional court, and subject to the enactment of laws by the Legislature for its control and direction, as well as to its jurisdiction. There is no constitutional limitation of the jurisdiction of circuit courts

as there is of city courts, and the enactment of laws by the Legislature authorizing circuit courts to change the venue by virtue of Section 36 of the Venue Act is valid as to such circuit courts, and is not valid as to city courts in cases not arising within its territorial limits and of which it has no jurisdiction, for the simple reason that the Legislature is powerless to add to the city courts' jurisdiction that which is forbidden by the Constitution. A city court is a court of limited jurisdiction and there are no assumptions or intendments in favor of its jurisdiction not expressed in the law, as there is in the case of a circuit court.

It is undoubtedly true that a superior court of general jurisdiction proceeding within the general scope of its powers, is presumed to act rightly. All intendments of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgments it renders until the contrary appears. And this presumption embraces jurisdiction not only of the cause or subject matter of the action in which the judgment is given, but of the parties also. * * * This is a familiar law, and is asserted by all the adjudged cases. The rule is different with respect to courts of special and limited authority; as to them, there is no presumption of law in favor of their jurisdiction; that must affirmatively appear by sufficient evidence or proper averment in the record or their judgments will be deemed void on their face.

Galpin v. Page, 85 U. S. (Wall. 18) 350, 365;
Brown v. Van Keuren, 340 Ill. 118;
Kenney v. Greer, 13 Ill. 432;
Dowling v. Stewart, 3 Scam. 103;
Shufeldt v. Shufeldt, 45 Ill. 223;
Hook v. Wright, 329 Ill. 299;
Keal v. Rhydderck, 317 Ill. 232;
Musselman v. Paragnik, 317 Ill. 597;
Oakman v. Sinall, 282 Ill. 353.

Practically every position taken by petitioner is answered fully by the decision in the case of Herb v. Pitcairn, 384 Ill. 237. The Court in its opinion in this suit states that "our disposition of the identical issue in Herb v. Pitcairn is decisive here." This reference perhaps does not make the Herb opinion a part of the record in this suit, and the same is not included in the record here. For the convenience of the Court we have attached hereto as an appendix a copy of the opinion rendered by the Supreme Court of Illinois in the cause of Herb v. Pitcairn.

Respondent submits that the writ of certiorari should be denied, and prays that the Court so order.

Respectfully,

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APPENDIX.

Opinion of Supreme Court of Illinois

(384 Ill. 237)

in

Victor J. Herb, Appellant, v. Norman B. Pitcairn et al., Receivers for Wabash Railway Company, Appellees.

Mr. Justice Gunn delivered the opinion of the court:

The appeal in this case is taken by the plaintiff, Victor J. Herb, from the judgment of the circuit court of Madison county sustaining the defendants' motion to dismiss, and entering final judgment of dismissal in favor of defendants-appellees. Among the grounds urged before the circuit court as a basis for such dismissal was the unconstitutionality of a statute, as shown by the certificate of the trial judge, which would give us jurisdiction of the direct appeal, whether or not the case was decided upon that point. Groome v. Freyn Engineering Co. 374 Ill. 113.

The facts in the case are substantially as follows: The plaintiff was an employee of the receivers of the Wabash Railway Company, and December 22, 1937, commenced an action in the city court of Granite City, Illinois, against the defendants stating a cause of action under the Federal Employers' Liability Act for injuries claimed to have been sustained in the city of Decatur, Illinois, November 23, 1936. The defendants answered denying the allegations of the complaint and setting up other defenses. The cause was tried in the city court in October, 1938, and resulted in a verdict in favor of the plaintiff, which was set aside upon a motion by the defendants for judgment notwithstanding the verdict.

The plaintiff appealed to the Appellate Court, where the cause was reversed and remanded, which action was affirmed by this court in Herb v. Pitcairn, 377 Ill. 405.

After the cause had been redocketed, but before it was tried, the cases of Werner v. Illinois Central Railroad Co. 379 Ill. 559, and Mitchell v. Louisville and Nashville Railroad Co. 379 Ill. 522, were decided by this court, in which it was held and determined the city courts in Illinois were without jurisdiction to hear and determine the subject matter of any action, the cause of which arose outside of the territorial limits of the city court in which the action was pending. After learning of these decisions the plaintiff filed a motion in the city court of Granite City for a change of venue to the circuit court of Madison county, under the provisions of the statute purporting to authorize a change of venue of a suit commenced in the wrong court or county to the proper court or county, as in cases of change of venue. (Ill. Rev. Stat. 1941, chap. 146, par. 36.) The motion for change of venue was allowed by the city court and the venue ordered changed to the circuit court of Madison county, and on July 31, 1942, all of the pleadings and papers, and a certified transcript of all orders in said cause in the city court of Granite City were duly filed in the circuit court of Madison county, as on change of venue.

August 21, 1942, appellees filed in the circuit court of Madison county their motion to dismiss plaintiff's cause for the following reasons: That since the city court of Granite City had no jurisdiction of the case because it appeared the cause of action accrued outside of the territorial limits of Granite City (1) all orders entered, and all proceedings had in the city court of Granite City, including the order changing the venue thereof, were void and of no effect; (2) that the statute authorizing a city court to change the venue of an action of which it has no jurisdiction to a court having jurisdiction is contrary to section 1 of article VI of the constitution, and therefore void; and (3) said cause having been transferred on change of venue on July 17, 1942, more than two years after the date of the

injury, November 23, 1936, the plaintiff could not maintain his action because it had not been commenced within two years from the date of his injury in a court having jurisdiction to hear and determine the same.

The circuit court of Madison county sustained the motion of appellees to dismiss plaintiff's suit, and November 27, 1942, entered judgment that the plaintiff take nothing, and that the defendants recover costs. After the entry of judgment the judge of the circuit court signed a certificate that there was involved in the said final order and judgment the construction of the constitutions of the State of Illinois and of the United States, and the validity of a statute, (Ill. Rev. Stat. 1941, Chap. 146, par. 36,) and also the validity, construction and application of a Federal statute, viz., section 6 of the Federal Employer's Liability Act as amended. Section 56, Title 45, U. S. C. A. 1941.

The material point for consideration is whether the plaintiff has commenced an action within two years of the date his injury in a court having jurisdiction to hear and determine the same, as required by section 6 of the Federal Employers' Liability Act, by transferring the cause from a court having no jurisdiction over it at a date which, if then originally filed in the latter court, could not be maintained because not filed within the statutory time. The question involved relates to the effect of the proceedings had in a court wholly incompetent to render a valid judgment, because if the judgment to be rendered would be void it necessarily follows the preliminary proceedings of the court, necessary to rendition of judgment, must likewise be void. If the court has no jurisdiction of the subject matter for judgment there can be no jurisdiction giving effect to process or pleadings. If judgment had been entered in the city court it would have been absolutely void. (Werner v. Illinois Central Railroad Co. 379 Ill. 559; Mitchell v. Louisville and Nashville Railroad Co. 379 Ill. 522.) The act of a tribunal beyond its jurisdiction is null

and void whether without its territorial jurisdiction or beyond its powers. (Welton v. Hamilton, 344 Ill. 82.) A judgment void upon its face and requiring only an inspection of the record to demonstrate its invalidity is a mere nullity, in legal effect no judgment at all, conferring no right and affording no justification. (Voorhees v. Bank of the United States, 10 Pet. 475, 9 L. ed. 501.) Nothing can be acquired or lost by it; it neither bestows nor extinguishes any right. (Johnson v. Carroll, 190 Ky. 689, 228 S. W. 412; Abernathy v. Missouri Pacific Railway Co., 287 Mo. 30, 228 S. W. 486.) It can be attacked at any time, even in the first instant on appeal. (Campbell v. Porter, 162 U. S. 478, 40 L. ed. 1044; Perez v. Fernandez, 202 U. S. 80, 50 L. ed. 942.) And it may not be validated either by waiver or consent. (Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914.) Where there is a want of authority over the subject matter the judgment is open to successful impeachment, if such fact is made to appear from the face of the record or by matters dehors, where extraneous evidence is receivable for the purpose. Armstrong v. Obuchon, 300 Ill. 140; Rabbitt v. Weber & Co., 297 Ill. 491.

It is the element of jurisdiction that differentiates a void from a voidable judgment; both the subject matter and the parties must be before the court, and jurisdiction of the one without the other will not suffice; the two must concur or the judgment will be void in any case in which the court assumes to act. (Rabbitt v. Weber & Co. 297 Ill. 491). And we have further held that even a court of general jurisdiction has no power to do any act or render any judgment affecting persons or property, unless the particular act or judgment is brought within its jurisdiction according to law. (People ex rel. Brundage v. Righeimer, 298 Ill. 611.) These are general principles upon which substantially all courts are in agreement.

Applying now these principles to the facts before us we observe recovery under the Federal Employers' Liability

Act is conditioned upon two things: (1) commencing an action within two years from the date of the injury; and (2) commencing such action in a court having jurisdiction to hear and determine the same. It has been held by the Federal authorities that section 6 of the Federal Employers' Liability Act is not a statute of limitations pertaining to the remedy, but is a condition of liability constituting a substantial part of the right created. (Central Vermont Railway Co. v. White, 238 U. S. 507, 59 L. ed. 1433; Phillips v. Grand Trunk Railway Co. 236 U. S. 662, 59 L. ed. 774; Bell v. Wabash Railway Co. 58 Fed. (2) 569; Atlantic Coast Line Railway Co. v. Burnette, 239 U. S. 199, 60 L. ed. 226.) The plaintiff having predicated his case upon the Federal Employers' Liability Act must comply with its provisions, both with respect to the time of commencing the suit and of bringing it in a court having jurisdiction to hear and determine it.

While the appellant does not precisely so state, apparently it is his contention that, having begun the suit in a court without jurisdiction of the subject matter but having changed the venue thereof and transferred it to one that would have jurisdiction, the date of the transfer to the latter court would relate back to the time of filing it in the court not having jurisdiction, thus giving the order changing the venue the effect of having a case continuously pending in the court of proper jurisdiction from the time the action was commenced in the one not having it. The fallacy of this argument rests in the fact that it becomes necessary to give validity to proceedings in a court, the judgment of which, if rendered upon such proceedings, would be wholly void. If the ultimate object to be obtained in a suit at law, viz., a judgment, is utterly void, it is difficult to understand how any of the preliminaries to such a judgment, such as summons, pleadings, interlocutory orders and the like have any effect, when the result, had such proceeding been concluded in the first court, would have been a nullity.

A case in point is illustrated by the facts in Crowley v. Southern Railway Co., 139 Fed. 851. The Alabama legislature had attempted to create a circuit court with different divisions, but the act creating it was held unconstitutional in Ex rel. Birmingham and Atlanta Railway Co., 42 So. 118. In the Crowley case the cause of action was claimed to be saved because a summons had been issued out of such illegal division of the circuit court, but in commenting upon the effect of this summons the court said: "The act constituting the southern division of the circuit court of St. Clair county at Pell City being unconstitutional, there was no authority for filing the summons and complaint with Smith or anybody else at Pell City. The issue of the summons to appear before a court or at a time not authorized by law was a nullity, and so was the service of the summons. What was done in this matter at Pell City was as ineffectual to constitute a 'suit' in the real circuit court of St. Clair county as if the plaintiff had filed the summons and complaint with some merchant at Pell City and procured him to hand them to the defendants." In substance the same has been held in Inter Southern Life Insurance Co. v. Pierce, 31 S. W. (2) 692; Willing v. Provident Trust Co., 21 Fed. Supp. 237; Manning v. Ketchem, 58 Fed. (2) 948, and stated in the text of Cor. Jur. Sec. Vol. 21, pages 177 and 178. And in Vincent v. McIlvain, 304 Ill. 160, at 163, it is said a suit or action is commenced when the party puts in motion, under his claim, the instruments of a court of general jurisdiction.

When the present suit was filed in the city court of Granite City the defendants could have disregarded the summons, and judgment rendered in such court would have been without effect and no justification for seizing defendants' property on execution. Yet, if appellant's contention is sustained, a valid judgment could be obtained by transferring the cause to the proper court upon a summons or notice that defendants could safely disregard

when served upon them. This would give the order of transfer by the city court the effect of vitalizing process that was void and considering a case commenced and pending in a proper court during a period when, in legal contemplation, no judicial control of defendants had yet been exercised.

Conceding, but not deciding, that in proper cases a court without jurisdiction of the subject matter could by statute be authorized to transfer its proceedings to a court having jurisdiction, still the condition that the action be commenced within two years is not met. A like situation has been presented under statutes extending time for bringing suit where an action has been commenced but the plaintiff nonsuited, as illustrated by section 24 of the Limitations Act. (Ill. Rev. Stat. 1941, chap. 83, par. 24a.) Under the conditions present in this case it has been held such statutes cannot recreate a right given under a Federal statute that has ceased to exist by the terms of the (Federal) statute. (Bell v. Wabash Railway Co., 58 Fed. [2] 571; Denny & Co. v. Southern Pacific Co., 263 Ill. App. 106; Sweet v. Chattanooga Elec. Lt. Co. (Tenn.), 36 S. W. 1090; Gulf, O. & F. S. Railway Co. v. Gordon, 218 S. W. (Texas) 74; Fidelity Trust Co. v. Gill Car Co., 25 Fed. 737.) In the last case the language used covers precisely the present situation when it is said: "Not only must there be a controversy, but as well always a form of procedure of some kind, possessing all the necessary elements of a 'suit' or 'case' in court, the most important of which is, no doubt, that there shall be a tribunal authorized to issue that indispensable notice which we call a writ of process, to bring the parties together in court; and this must be not only sufficient in form and in fact, but in legal and technical effect, to constitute a 'suit' or 'case' which can only be when the tribunal undertaking the initiatory steps is duly authorized to do that thing and to proceed with the matter of adjudging between the

parties. * * * There must be ex necessitate rei, a court having power to set in motion the machinery of the law, and this we call its jurisdiction over the subject matter."

Appellant calls our attention to Central Illinois Public Service Co. v. Industrial Com., 293 Ill. 62, as supporting his claim that the want of jurisdiction of the Granite City city court did not prevent its properly being in the circuit court of Madison county for all purposes. In that case we held the venue statute in Illinois, as applying to a circuit court having no jurisdiction over the subject matter, has no other purpose than to authorize a transfer to another circuit court which had, but does not affect any of the other rights of the parties. This case was so interpreted in Gill v. Lynch, 367 Ill. 203. In the case last cited a receiver had been appointed in the county court under the so-called Skarda Act. (Laws of 1933, p. 874.) The act was later held unconstitutional. A petition was then filed to transfer the venue of the case to the circuit court. The question arose as to the effect of the appointment of the receiver in the county court after the case had been transferred to the circuit court. The question presented for decision was set out as follows: "The question in the case is whether or not the appointment of a receiver for real estate by a county court having no jurisdiction of the subject matter, is validated by a subsequent transfer of the cause to the proper court, under the provisions of the statutes relating to venue." The circuit court held the plaintiff, county treasurer, could not recover anything held by his predecessor in office as receiver under appointment by the county court because the proceeding was absolutely void. In affirming that decision we held that the appointment of a receiver in the county court and all subsequent orders, except the one transferring the cause, were void. And among other things we said: "The effect of proceedings in courts having jurisdiction of the subject matter is not material here. Principles applicable to such

cases have no bearing where the court has no jurisdiction to entertain the cause. It is a cardinal principle of the law that void proceedings are without any force or effect, and are always subject to attack, either directly or collaterally. Neither section 16, nor the act of 1891, contains any provision that, by the most liberal interpretation, can be construed as validating void judgments or proceedings." The distinction to be drawn is that if a case is improperly filed in a court having jurisdiction of the cause generally but without its territorial jurisdiction, it may be transferred to the proper circuit court. But, if the cause is filed in a court which could never lawfully acquire jurisdiction, the transfer to a court which would have had jurisdiction gives no validity to the proceedings in the first court. We think the interpretation of the venue statute in the Gill case conclusively is against appellant.

It is clear a suit was not commenced by filing the present suit in the city court of Granite City or by issuing summons or filing a complaint. Lacking requisite jurisdiction because of the provisions of the constitution limiting it to cases arising within the limits of the city, such court was wholly incompetent to render any judgment or to authorize any proceedings which would result in a judgment. When the case was transferred to the circuit court of Madison county, some five years after the date of the accident, by the filing of the transcript of orders entered in the city court, and the pleadings and other documents, there was no commencement of a suit, but only the receipt of papers from a court in which it was impossible to commence one because of its lack of jurisdiction. To hold the suit was started in the circuit court at the time when it was attempted to be commenced in the city court is not only to decide something which is obviously not the fact, but also to give effect to the proceedings in another court, which up to that time must be considered as a nullity. To so hold would in effect revive a cause of action already

barred by limitations and deprive the defendant of a vested right. Cooley's Constitutional Limitations, p. 448.

In this case jurisdiction of the suit was wholly lacking until July 31, 1942 (if we consider the change-of-venue act valid), and at this time the condition imposed upon the plaintiff with respect to bringing his suit had expired by lapse of time. This determination makes it unnecessary to pass upon either the constitutional question involved or the validity of the change-of-venue statute.

It is our conclusion the judgment of the circuit court of Madison county in dismissing the suit and entering judgment against the appellant was correct, and its judgment is accordingly affirmed.

Judgment affirmed.